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Citation for published version:

Walker, N 2012 'The Shifting Foundations of the European Union Constitution' Europa Working Papers, no. 2012/1, University of Edinburgh, School of Law, Working Papers. DOI: 10.2139/ssrn.2091032

Digital Object Identifier (DOI):

[10.2139/ssrn.2091032](https://doi.org/10.2139/ssrn.2091032)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Publisher's PDF, also known as Version of record

Publisher Rights Statement:

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Research Paper Series No 2012/18

Europa Working Paper No 2012/1

The Shifting Foundations of the European Union Constitution

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*forthcoming in Galligan and Versteeg (eds), Social and Political Foundations of
Constitutions (Cambridge University Press, 2013)*



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Abstract

This article traces the contested and unresolved history of EU constitutionalism. In particular it looks at the interaction of three strands; judge-centred legal constitutionalism, implicit documentary constitutionalism (itself divided into more or less evolutionary or foundational sub-strands) , and Big 'C' explicit documentary constitutionalism. It examines the various shifts not only in the actual pattern of relations between these strands, but also in how they are incorporated into dominant insider narratives. After the failure and fall of the (first ever) explicit Constitutional Treaty of 2004, the dominant insider constitutional narrative remained explicit, but no longer tied to a self-certified constitution of a foundational nature. Rather, it (re)stressed in express constitutional language the incremental and evolutionary quality of the EU's distinctive polity development and achievement. Given the present Euro crisis however, the evolutionary narrative, predicated upon continuing overlapping consensus, is under threat, and the return (and, perhaps, final rejection) of explicit foundational constitutionalism cannot be discounted. The story of the EU's constitutional origins, therefore, remains unfinished, and is closely tied up with the very fate of the EU polity.

Keywords

Constitution, legal order, Constitutional Treaty, state, EU, Euro crisis

The Shifting Foundations of the European Union Constitution

Neil Walker

METHODOLOGICAL POINTERS

If we want to say anything of interest about the social and political foundations of the European Union constitution, we must attend to the ways in which it is both distinctive from and comparable to other constitutional origins. This reflects a general imperative of comparative methodology (Glendon 1992, Dixon and Ginsberg 2011, Rosenfeld and Sajo 2012). We compare in order to find out both what is atypical and special about the particular case, and also what is more typical and general. We need, therefore, to have some prior sense of the general type in order to inform our understanding of the particular case, and, reciprocally, we should also be open to the new particular case augmenting our understanding of the general type.

This methodological starting point may seem to pose an immediate problem for our understanding of the constitutional character of the European Union. In many ways, what at first glance is interesting about it concerns its emphatic distinctiveness. Famously described by Jacques Delors, while president of the European Commission, as “an unidentified political object” (Drake 2000: 5), the EU has also provoked many commentators to remark upon its atypicality, its *sui generis* quality (MacCormick 2005, Verhoeven 2002). So much so, indeed, that we often seem to be straining to fit it into an analytical model based upon standard constitutional characteristics. Even to start from the premise that the EU constitution bears a family resemblance to the general constitutional type—and so can stand in a relationship of reciprocal illumination with the general type—is perhaps, then, to beg the question, and to threaten to distort the inquiry from the outset.

This danger can be overstated. Provided we define what counts as constitutional in terms which are not slavishly tied to the tradition and template of statehood and so do not rule out non-state constitutionalism by conceptual fiat, much common ground reveals itself between the kind of constitutional project the EU is engaged in and those familiar from state settings. The differences can be exaggerated as much as the similarities, and often have been, sometimes for the commentator’s own ideological reasons.¹ Equally, many of the similarities

¹ As in Jack Straw’s well-known suggestion, seeking as Foreign Secretary to defuse the significance of the UK New Labour government’s support for the Constitutional Treaty process before a Eurosceptical national electorate, that nothing of importance should be read into the ‘constitutional label. According to Straw, even

are so obvious, so embedded and matter-of-fact that they seem unremarkable, and so fail to be remarked upon.

In particular, the origins of the EU constitution, like the origins of many “first” state constitution, is bound up with the formation of a new polity by means which, through a documentary project and process of what I term “multi-framing” (Walker 2009, Walker 2012), draw upon and develop a combination of legal, political and socio-cultural resources. This is the key common ground between the EU’s constitutionalizing experience and that of a state polity. As we shall see, to the extent that, alternatively, we can think of the EU, in its earlier phase of institutionalization, as having undergone a significant pre-documentary phase of polity development and informal constitutionalization, it may also be possible to locate some common ground between the EU’s subsequent and explicit constitutionalizing project of recent years and that of successor state constitutions concerned with “mere” institutional reform or regime change. These different comparative points of departure, with much greater emphasis upon the polity-formative analogy, focus our investigation of what is remarkably familiar and unfamiliar about the EU’s early constitutional trajectory. However, the very fact that the EU constitution can be looked at from both perspectives—either as polity-formative or as building on a pre-existing edifice—is noteworthy. It anticipates what will be a constant theme of this chapter, namely the deep and resilient absence of a common framework of understanding about the nature and course of supranational constitutionalism. As we shall see, the persistently unresolved quality of the European constitutional “settlement” is doubly significant for our attempts to make sense of its social and political foundations. For that unresolved quality is reflected not only in the uneven and unpredictable trajectory of emergence of supranational constitutional law and discourse considered from an external standpoint, but also in the shifting identification, interpretation and utilization of these historical foundations by key actors internal to the debate.

Let us proceed, first, by investigating the deep structural reasons why the EU polity context has proved both an attractive and a controversial context for the emergence of constitutionalism. We will then examine in some depth certain key strands in the EU’s early constitutional development that follow from these background considerations.

“golf clubs all across Scotland have constitutions. See *The Guardian* August 27th 2002.
<http://www.guardian.co.uk/world/2002/aug/27/eu.politics>

WHAT KIND OF CONSTITUTION FOR WHAT KIND OF POLITY?

So runs the title of an influential set of essays written in response to the well reported “Humboldt speech”² in May 2000 of the then German foreign minister, Joschka Fischer, calling for some kind of “deliberate political act to re-establish Europe” (Joerges et al. 2000). This intervention, the first by a serving minister of a leading European state to call for a documentary constitutional process for the European Union—is often viewed as a key catalyst for the Convention process of 2002-2003 under the Presidency of Giscard D’Estaing and the Draft Constitutional Treaty that followed in 2004. It is also an apt title for present purposes. On the one hand, it suggests, as noted above, that the EU’s constitutional development, like that of a state, is indeed bound up with the development of the EU as a polity. On the other hand, the question mark implies that, unlike the state, the very nature of the polity and the nature of the constitution appropriate to that polity remain unresolved.

In crude terms, however obscure and controversial the path of constitutional development and the polity prognosis of any particular state, the state remains a settled and uncontentious general political *form*—a recognizable template which in turn shapes and stabilizes our understanding and expectation of the contribution made to that political form by its constitution. In contrast, the EU is not a settled political form. There is no genus of which it is a species, and our sense of the appropriate manner and function of the contribution made by its “constitution”—if indeed *any* such ‘constitutional’ contribution is appropriate—to that unsettled political form is correspondingly uncertain and contentious. The nature of the EU polity and the potential contribution of any constitution to the making of that polity is both underdetermined on grounds of political epistemology—an unprecedented and uncharted political experiment, and controversial on grounds of value—a political experiment that is both fundamentally challenged by its opponents and the object of highly diverse justification by its supporters. Each feature—indeterminacy and controversy—reinforces the other in contributing to the unresolved constitutional status of the EU (Walker 2012).

Let us explore this unresolved quality and examine how it differs from the settled multi-frame form for the organization of the state polity (Walker 2009). The state constitutional multi-frame provides, first, for an exclusively and comprehensively authoritative and so “sovereign” *legal order*. It also provides for the institutional elaboration and co-ordination of the organs of that state polity conceived of as a self-contained *political system*. Finally, the constitution contributes to the *socio-cultural substratum* necessary for its

² In its English translation the speech was entitled “From Confederacy to Federation: Thoughts on the Finality of European Integration.”

own effective legal and political articulation; typically, this societal traction is sought through the deliberative resolution, adaptation (through amendments or later settlements) and resonant and lasting cultural expression of a political pact committing to the making and maintenance of the polity in the name of a collective agency collectively self-understood as the self-legislating citizenry of a political community.

It should be emphasised that these three framing features apply as much to a federal state polity as to a unitary state polity. The federal state, of course, will typically embrace multiple levels of legal and political architecture, and also of citizenship status. However, it is also true of the federal state, as opposed to the mere multi-state confederation, that these various frames - legal, political-institutional and citizen identity - are each in the final analysis resolved in a singular fashion through the overarching constitutional settlement itself. The constitutional settlement, in other words, provides a final and undisputed authority for the federal state polity considered as a whole, dictating the relationship between the various levels. It remains the source of comprehensive legal authority, institutional capacity and citizenship statuses, including, crucially, the various mechanism for resolving conflict or co-ordination problems between the different levels to which this plenary authority and capacity is distributed.

Whether, to what extent and in what ways these various interlocked “constitutional” frames and processes are relevant to the EU and its “non-state” polity remains an open question. It is a question that cast a shadow over all matter relating to, and, indeed, all accounts of its constitutional origins and trajectory. The EU polity has its own legal order and a Court of Justice which asserts the primacy of that legal order within its own area of jurisdiction. In practice, however, it is a jurisdiction that is limited in scope and that overlaps, sometimes co-operatively and sometimes competitively, with state legal systems and their higher courts, which continue to defend the priority in the last analysis of national constitutional law against external challenges and to treat European law itself as a creature of international agreement (De Witte 2011: 350-57). Accordingly, the legal constitution of the EU lacks both the comprehensive remit and the monopoly of final authority associated with the legal-constitutional order of the “sovereign” state. Equally, while the EU has developed a political system which possesses recognizable judicial, legislative, executive and administrative organs, it remains a “mixed” (Majone 2002) and incomplete political system rather than a purely self-contained one. It is mixed in the sense that some of its key institutions, in particular its Council and European Council, are composed of officials from other (state) polities. It is incomplete due to the fact that it depends not only upon the courts

but also upon the political institutions of other polities—in particular national parliaments and governments—for the transposition and implementation of its norms and decisions. Again, this is an overlap which is sometimes co-operative—involving concerted action between national and supranational levels, and sometimes competitive—involving a clash of interest or priorities between these levels.

Finally, while since the Treaty of Maastricht of 1992 the EU has proclaimed itself to possess its own citizenry and associated culture of political community, this is again a contentious category and one that has not (yet) been consecrated in the expressively collective self-legislative form of a self-styled written constitution. For some supranational citizenship is understood in an open-ended and ambitious way, as a harbinger of a “thicker” sense of membership. For others it is understood as derivative and secondary rather than an original and primary form of political identity, parasitic now and indefinitely upon the original member state citizenship without which one cannot be a supranational citizen (Shaw 2011).

Crucially, in none of these three areas - legal order, political institutionalisation and citizenship status - is there any overarching framework standing above both the EU and the member states and reconciling them as different levels of one and the same polity. In other words, while the EU shares many multi-level features in common with the federal state, the longstanding absence of any agreed higher authority to resolve the relationship between the supranational - considered as “federal level” - and the member states - considered as “provinces” - marks a key difference. It means that, in the last analysis, just as the EU is too limited in remit to be viewed either as a comprehensive and self-contained polity in its own terms, so, too, it cannot be considered as a mere constituent part of one larger settled “federal” constitutional polity alongside the member states (Maduro 2003, Walker 2003b). Its constitutional identity, such as it may be, must be forged in the indistinct and contentious terrain between these two possibilities.

A number of points follow from the underdetermined and contentious nature of the EU polity which helps account for the pattern of emergence of its constitution. These will provide the focus of discussion in the three sections below. First, since the question of what, if anything, are the limits of the EU’s polity ambition remains obscure and controversial, then we should not be surprised by the persistence of the European debate over the role of the constitution in meeting that ambition. In particular, the adaptability to the supranational context of the canonical constitutional expression of polity ambition in the state context—namely the documentary pact viewed as the foundation and framework of a polity project

unlimited in scope—has been a frequently contentious matter. The Treaty of Paris setting up the European Coal and Steel Community (ECSC) was signed in 1951 and the Treaties of Rome establishing the European Atomic Energy Community (EURATOM) and the European Economic Community (EEC) followed in 1957. But both before and after supranational Europe's early Treaty troika the question of a more ambitious constitutive document was a recurrent one, yet also a recurrently problematic one.

Secondly, there is the question of uneven development. In the settled constitutional form of the state polity the framework of exclusive comprehensive legal authority, institutional self-containment and political-cultural self-authorization and identification tend, under the co-coordinating mechanism of the foundational documentary constitution, to become gradually embedded in a mutually supportive relation, even if these legal, politico-institutional and cultural components are typically not born together.³ In the unresolved and as yet undocumented EU constitution the different generative conditions and the unevenness of development of the three registers of constitutionalism are more pronounced.

Thirdly, the unresolved quality of the EU constitution is also associated with the move in recent years from implicit to explicit constitutionalism. In the early years, even in the context of debate over documentary origins, the “C” word remained in the background. Explicit constitutionalism, through an increasingly expressive discourse of constitutionalism and the use of the full array of the familiar symbology of constitutional origins and sustained development, has come rather late in the day. It has coincided with the rise and fall of the Constitutional Treaty of 2004, though its object of reference is by no means restricted to the canonical documentary form. This shift has significantly altered the texture of debate over constitutionalization and constitutional origins, with consequences that remain unpredictable today.

THE PERSISTENCE OF THE DOCUMENTARY FOUNDATIONS DEBATE

The high point—the point of maximum salience—of the debate over the documentary foundations of the EU has undoubtedly been reached in the years leading up to and following the Convention on the Future of Europe of 2001-2003 and the failed Constitutional Treaty. We will discuss this in Section Five below. However, the issue of documentary foundations—of a basic text that is constitutive in form and function if not necessarily

³ Possibilities range from the United States model in which the self-authorizing constitutional instrument predates the cultural construction of “national” community and the political architecture of the state to various European continental models where either (e.g. France) or both (e.g. Germany) “state” and “nation” predate the explicitly constitutional project (see M. Rosenfeld 2010: chs. 5-7).

“constitutional” in self-description—has been present as a contemporary question from the beginning of the supranational project and remains with us after the failed Constitutional Treaty. As we shall see below, the dominant early post-Constitutional Treaty narrative of constitutional origins and development is an incremental one—of a polity that has eschewed the foundational documentary form and ambition and instead seeks in its maturity its own distinctive type of constitutional accommodation. There are interesting reasons why this is the case. However, on close inspection the *actual* historical record of the debate over constitutional origins, as opposed to the dominant narrative reconstruction of that history, is as much one of the iteration of failed documentary constitutional initiatives as it is one of evolution and maturation.

The idea of Europe, of course, long predates the late twentieth century debates and struggles over its evolving political form. The concept itself dates back to the fifteenth century, (Hay 1957) but it was only with the onset of the secular Enlightenment that it began to replace Christendom as the key designation of a unitary civilization. eighteenth century figures as diverse as Montesquieu, Voltaire, Vattel and Burke came to understand Europe as a place of social similarity and political balance (Anderson 2009). This harmonious Enlightenment image did not survive the French Revolution. Yet the notion of Europe as a single cultural space containing many political units and ethnic groups persisted, creating and sustaining a sense of continental identity unknown in other global regions. (Pagden 2002) Alongside this cultural development there have been many political projects of continental union, going back as far as the French Duc de Sully’s Grand Design of 1620. Yet as one writer puts it, this kind of project has always been “formally at odds with itself” (Anderson 2009: 477). The political recognition of Europe as a discrete object could from the outset only be of an entity whose basic structure and distinctive configuration was one of prior political division and plurality. On the one hand, this underlying structure made for a fragile and often broken inter-state accommodation, hence the attraction of projects of union. On the other hand, some such projects, in their overweening ambition, were liable to destroy the very diversity that was Europe’s distinctive political inheritance.

The approach taken to Europe’s political configuration has always taken different forms, reflecting both horns of this dilemma. Some projects have been premised on consensus, but have remained largely theoretical. The more practical projects have tended to operate through conquest or imperial design. This speaks to a contrast, and to a relationship born of contrast, which also strongly marks the twentieth century origins of the European Union In 1929, the French Prime Minister Aristide Briand, operating in the shadow of the

First World War and in anticipation of the Third Reich, floated through the League of Nations the idea of a consensual federation of European states. The immediate origins of the contemporary continental polity can also be seen in large part as a response to the unilateral vision of regional domination which provoked the Second World War. (Weiler 1999, Lindseth, 2010, chs. 2-3, Muller 2011: ch.4, Anderson 2009: ch.9)

Yet, even though joined by a shared reaction against the forced union of conquest and a commitment to peaceful collaboration, there were competing visions of the nascent post-War Europolity. This competition was framed by a basic division between an ambitious and overtly neo-federalist conception of the European Union, one premised on the equality of the member states, and a more modest, narrower conception of continental integration. The first saw the federal vision as a grand political project for a post-bellum continent dedicated to learn and perpetually apply the geopolitical lesson of uncoerced co-existence. In its ambition and in its desire to mark a new continental beginning, this approach, as, for example, anticipated in Altiero Spinelli's pan-European Ventotene Manifesto of 1940, (Burgess 2000, Urwin 2007) was one that strongly favored a "big bang" foundational solution.

The second and narrower conception was based upon a platform of common or pooled economic affluence and other manifest common goods. To complicate matters further, the more modest approach included highly influential founding figures such as Jean Monnet and Robert Schuman⁴ whose long-term vision was also a neo-federalist one, but based instead upon a process of gradual accretion from a narrow basis through a series of limited actions and innovations. This was famously summed up in the pronouncement in the 1950 Schuman Declaration that "Europe should not be made all at once, or in accordance with a single plan"—a commitment which provided the platform for the ECSC Treaty of the following year. However, alongside this so-called "Monnet method", on which so much of the subsequently influential neo-functionalist theorizing of EU integration is based, (Hass 1958) there was another more bounded approach to European integration. For those, such as the followers of German ordoliberalism according to whom the operation of the market should be ringfenced from the exercise of social policy, and for many other pragmatic nationalists identifying discrete arenas of overlapping interest, the making of a common economic area was an end in itself. Europe was conceived of as a regulated supranational market-making framework, able to enhance the common pool of resources and improve the

⁴ Schuman was the French Foreign Minister from 1948 to 1953. Monnet, a career diplomat, was head of the post-War French General Planning Commission, and is widely regarded as the visionary mind behind the Schuman Plan.

economic welfare of all member states, but in so doing to be excluded from influence over state-based market-correcting social and welfare policy (Mestmacker 1994, Chalmers 1996, Joerges 2001, Milward 2000).

As already suggested, the explicit neo-federalists, and, to a lesser extent, even the federal incrementalists were likely to favor more broadly constitutive documentary foundations. Following on the original ECSC Treaty of 1951 there occurred the double failed initiative of the European Defense Community and the European Political Community in 1952-1953. Tellingly, the EPC blueprint, though not explicitly called a Big "C" Constitution, included within it a bicameral legislature charged with selecting its own executive—a centralizing template for a parliamentary executive still not fully achieved in the EU today. It also included the familiar state-constitutional and citizen-constitutive proposal of entrenching and enforcing individual human rights against the institutions of the supranational body itself, this being an issue treated by the EPC's ad hoc constituent Assembly's revealingly self styled *Constitutional* Committee (De Burca 2011, Urwin 2007).

The EEC Treaty of 1957, emerging from the wake of this double failure as the leading documentary platform of early supranationalism, was more narrowly economically conceived and more modest in the substance and tone of its proposals. Yet from time to time over the following thirty years the question of a neo-federal "big-bang" came back onto the political agenda. In 1984, the European Parliament, led by a federalist faction, launched a proposal for a new foundational document, styled the 1984 Draft Treaty Establishing the European Union. Preceding the reforms of the Single European Act of 1986 and the Maastricht Treaty of 1992, the proposal of the now veteran Spinelli was drafted against the background of the "Eurosclerosis" of the post Luxembourg Compromise years of the late 1960s and 1970s. Under the terms of the Compromise, provoked by the French President de Gaulle through his "empty seat" policy at the Council in 1965, the national veto had been reasserted over majoritarian initiatives where important interests of one or more members were deemed to be at stake. The 1984 Draft Treaty was in part a reaction to the political blockage created by this reassertion of intergovernmentalism. The proposal was also inspired by a new culture of supranational political confidence after the introduction of direct elections to the European Parliament in 1979. Despite the near-unanimous support of the Parliament, however, the Treaty had little impact in the wider circles of the EU, and was sidelined by proposals, enshrined in the Single European Act, to facilitate the completion of the internal market. Ten years later a similar initiative launched by the Belgian MEP, Fernand Hernan, in the context of the ratification crisis of the Maastricht Treaty met with even less

success. Self-styled a Draft Constitution for the European Union, it failed even to win the approval of the plenary Parliament (Christiansen and Reh 2009, ch.3).

What is striking about these failed constituent documents is that their occurrence is tied up with other Treaty-based initiatives that eschew or downplay the idea of a widely-drawn constituent compact in favor of a narrower and more gradualist approach to integration in which no single documentary agreement is either intended or treated as a foundation in perpetuity. These include the Treaty of Rome itself, the Single European Act of 1986, and the linked sequence of Treaty reforms at Maastricht, Amsterdam and Nice in the last decade of the twentieth century (De Witte 2002). The relationship between the two reform modalities is both competitive and symbiotic. The foundational approach repeatedly recurs because it represents one resiliently neo-federalist polity vision, and a response to the inadequacies and blockages of other approaches. Yet it also acts as a prompt to more modest methods of reform. By the same token, the foundational approach repeatedly fails not just because of opposition to its content but also because its very method begs the question of its “in-principle” appropriateness to this “new kind of polity.” As we shall see, this dialectical pattern to some extent continues with the Constitutional Treaty of 2004, but with some important new variations.

UNEVEN DEVELOPMENT: THE EARLY SIGNIFICANCE OF LEGAL CONSTITUTIONALISM

Alongside these two documentary strategies—foundational and incremental—and their complex interaction, a non-document-centered idea of legal constitutionalism has also figured prominently both in the practice and the articulated tradition of European constitutionalism. The focus here is on the very notion of an autonomous and self-empowering legal order, one developed under the stewardship of powerful judicial elite at the Court of Justice.

For much of the history of the European Union, indeed, this story of legal constitutionalism has been a story *about* elites sponsored and discussed *by* other (and overlapping) elites, and indeed, one whose power depends at least in some measure upon it remaining the preserve of elites. It is the story of a “quiet revolution,” (Stein 1981, Weiler 1999: ch.2)); of a constitutionalization *sub rosa*, by stealth. It centers on the early bootstrapping endeavors of the Luxembourg court in the first half of the 1960s, on the basis of an uncertain and incomplete mandate in the Treaty of Rome, to ensure the direct effect (*van Gend en Loos*, 1963) and supremacy (*Costa v ENEL*, 1964)—and so the basic state-penetrative reach and supervening authority of European law.

All versions of this “grand narrative” (Stone Sweet 2011: 132) have in common the idea of law performing a vital and well-tailored role in the construction and sustenance of the EU polity. Earlier versions of the narrative tended to adopt a functionalist tone, concentrating on the integrative *consequences* of these framing moves, with less emphasis on their motivating causes. A recent body of anthropological research, however, has underlined just how consciously motivated and far-sightedly intended these judicial initiatives were. It has demonstrated how important and how well orchestrated the original network of elite supranational actors in and around the Court of Justice was in developing the theme of “Europeanization through case-law” (Vauchez 2010: 2, Cohen and Vauchez 2008). Not only did the key formative decisions on supremacy and direct effect take place in acknowledgment of and in response to contemporary difficulties and loss of momentum associated with political integration, culminating in De Gaulle’s “empty chair” policy, but they also involved a highly self-aware and self-reinforcing mobilization of the very notion of the supranational community as a community of *law*. Rather than thinking of law-centered theories of integration as retrospective and mythologizing accounts of a founding, therefore, (which they also are), we are now also better equipped to understand them as active structuring devices, as means by which a tight-knit circle of pro-integration judges, civil servants, academics, MEPS, national diplomats and Commissioners became engaged “in real time” in a “circular circulation of ideas” (Vauchez 2010: 22) which contributed in a cumulative manner to the ascendancy of legal constitutionalism.

But why would, and why did the legal dimension prove so important in the constitutionalization of the European Union? There are a number of aspects to this.

In the first place, in instrumental terms, we must appreciate the indispensability of law as the basic motor of supranationalism—the key means to the end of European integration. Writing in the early 1980s, before the gradual development of qualified majority voting and the pronounced Treaty-based expansion of legislative jurisdiction beyond the market-making core, Joseph Weiler drew attention to the “dual character of supranationalism” (Weiler 1981) as the defining dynamic of Europe’s early evolution. At that stage, the developed character of legal or normative supranationalism in the area of the internal market, particularly the Court of Justice’s assertive development of the formal properties of the EU as an autonomous legal system, stood in stark contrast to a modestly conceived decisional or political supranationalism. Yet the two were strategically related. The early prominence of legal supranationalism occurred not in spite of political underdevelopment but precisely *because* political supranationalism remained so modest, with the member states retaining a *de jure* or

de facto veto power in most areas of European policy-making. The weakness of political supranationalism not only motivated the development of a compensatory legal constitutionalism, as we have already noted of the early judicial boot-strapping. The persistence of the national veto in supranational forms of legislative integration also offered reassurance to those who might otherwise have been concerned that legal constitutionalism would offer too much encouragement to a federalist vision. The most basic key to the attractiveness of law as the vehicle of supranational agency, therefore, lay in the fine balance that is struck. It depended on its regulatory capacity to steer, to consolidate and, typically through judicial recognition of the claims of private litigants, to guarantee positive-sum intergovernmental bargains across wide-ranging aspects of economic integration and some more limited aspects of market-correcting regulation, *yet* to do so without threatening key national political prerogatives. More specifically, the law's instrumental value was twofold. It provided a legible and stable method of charting and co-coordinating the supranational settlement. Additionally, in a context of market-making where the temptation for each national member of the continental trade-liberalizing cartel to engage in protectionism and other forms of discrimination while exploiting the general opening of the markets of the other national members posed a significant collective action problem, it performed a vital disciplining function. The consistent application and enforcement of the rules of the game by independent legal institutions was crucial in forestalling free-riding and rendering common commitments more credible (Shapiro 1999).

Structural factors reinforced the instrumental attractiveness of legal constitutionalism. The empowerment of the Court of Justice as the apex court responded to a conception of the supranational settlement understood, in the language of organizational economics, as an incomplete contract. Framework texts, even the relatively detailed codes of successive European Treaties, always allow a degree of open texture. In so doing they both lower the bar of prerequisite consensus and allow judicial adaptation of the text to changing conditions without new resort to the drawing board. The resulting margin of judicial maneuver is key to reconciling stability and flexibility in any constitutive context; all the more so in the EU, where the political conditions for regular textual reform, certainly over the first quarter century of the Union, were highly unfavorable. The Court of Justice, then, became a vital mechanism to avoid conflict or impasse associated with the divergence of national political interests. As a "trustee court" (Stone Sweet 2011) delegated significant power to bind its national principals and able through development of its formal legal-constitutional attributes to fortify and expand its zone of discretion, it could approach the task of "completing" the

supranational contract in incremental fashion. It would do so both by advancing the material agenda of integration case-by-case and by adjusting the balance, so sensitive in the mixed polity context, in boundary conflicts over the powers of the diversely-sourced institutions (Shapiro 1999: 321-22).

The fiduciary role of a trustee court in the making and consolidation of a legal constitution, however, is not legitimated solely through considerations of system functionality. Ideological factors also matter. The tradition of legal neutrality, assiduously cultivated in the context of a Court composed of senior jurists from all member states and conducting its business in a typically laconic and scrupulously non-partisan “legalese,” has lent cumulative authority to the court’s decision-making (Weiler 1999: ch.5). The fact that much of the constitutional jurisdiction of the EU and its judicial organs could be articulated in terms of (primarily economic) rights has reinforced this ideological advantage. It has meant that the Court of Justice, for all that it retained a considerable margin of discretion, could nevertheless engage in a constitutional vein in terms closely associated with its own ostensibly apolitical authority as an adjudicatory organ—in the language of individual rights and remedies so familiar from the historical lexicon of constitutional law (Stone Sweet 2011, Scharpf 2010).

If the assertion of such a robust legal persona has been the key to the capacity of the EU operating from its narrow stronghold of institutional power to exercise continental regulatory authority, its success also depends upon its resonance with many of the earlier and more narrowly economic justifications of the EU. In their different ways, two of the most influential of the early grand theories of integration, the German ordoliberal tradition (Mestmacker 1994, Chalmers 1995, Stolleis 2003) and Hans Ipsen’s idea of the EU as a special purpose association for economic integration, (Ipsen 1987) encouraged a law-centered perspective. As already noted, for the ordoliberals, the Treaty of Rome supplied Europe with its own economic constitution, a supranational market-enhancing system of rights whose legitimacy *required* the absence of democratically responsive will formation and of consequential pressure towards market-interfering socio-economic legislation at the supranational level, a matter best left instead to the member states—and even there only insofar as compatible with the bedrock economic constitution. Ordoliberal theory, then, provides a classic model of how an autonomous legal order, through generating and ring-fencing a framework of economic exchange centered on the four freedoms, provides a platform for the efficient operation of a capitalist economic logic

Ipsen's theory, to which Giandomenico Majone's contemporary work on the idea of a European "regulatory state" (Joerges 2001, Majone 1994, Majone 2009) is a notable successor, shares with ordoliberalism the idea that supranationalism should transcend partisan politics. Here, however, the ambit of law is extended so that the invisible hand of the market is supplemented by the expert hand of the technocrat. In Majone's elaborately developed conception—one that has continued to capture the sensibility of a significant part of the Brussels elite—these additional regulatory measures are concerned not with macro-politically sensitive questions of distribution. Rather, they attend to risk-regulation in matters such as product and environmental standards where expert knowledge is deemed paramount, and where accountability, it is argued, is best served by administrative law measures aimed at transparency and enhanced participation in decision-making by interested and knowledgeable parties rather than the volatile preferences of broad representative institutions.

For all these reasons therefore—instrumental, structural, formal and philosophical, law, and in particular the judge-made law of the Court of Justice, has supplied a power motor of constitutionalization in the early years of European integration.

THE EMERGENCE OF EXPLICIT CONSTITUTIONALISM

The delicate balance achieved by locking the EU's collective agency within a law-centered discourse and a narrow market-based justification could not, however, hold indefinitely. The pursuit and perfection of the narrow economic objectives of the Union progressively impinged upon a wide range of social issues, making "spillover" (Lindberg 1998) into politically contentious areas of traditionally national jurisdiction inevitable. Both ordoliberal and regulatory state approaches became increasingly vulnerable to the charge of drawing artificial distinctions between technical questions of market-making and standard-setting and deeply contested questions of value preference and transnational resource and risk allocation (Follesdal and Hix 2006).

As previously intimated, such a tension was in truth present from the very birth of supranationalism. Economic policies always carried significant implications, whether supportive or restrictive, for wider political projects and ambitions at the national or supranational level. Indeed, it was a powerfully supportive nexus between the economic and political which, from the Treaty of Rome onwards, permitted a considerable overlapping consensus between more or less federalist visions. The common market could be elevated to the defining supranational priority not just on wealth-maximizing grounds. Just as important

was the wider political prize of lasting peace that a culture of economic co-operation and shared affluence could help secure (Weiler 1999: ch. 7). Less felicitous connections between the narrow economic and wider political poles of integration, however, became ever more evident. As the EU increasingly sought market-making or market-correcting interventions involving politically salient choices, it simultaneously reduced the capacity of states to act independently in these policy areas. The robust juridical elaboration and protection of the single market which lay at the heart of legal constitutionalism had flourished in a formative context where market-making measures impinged only lightly on other social policy objectives; or, at least where states retained the procedural means to veto politically controversial collective commitments in pursuit of these other objectives, and so were slow to make such commitments in situations where there were obvious winners and losers. But the gradual expansion of the scope of negative integration from the narrow market-making sphere and the concomitant growth of positive integration decisively changed the dynamic of collective action. In particular, the Single European Act and the Maastricht Treaty cumulatively advanced the twin strategy of expanding the scope of supranational competence into traditional statist strongholds of monetary, social and security policy and providing new qualified majoritarian means to facilitate the exercise of this expanded jurisdiction.

The gathering danger was that the very strength of the law in supplying “both the object and agent of integration” (Dehousse and Weiler 1990: 243)—in providing the main fruit of the “thin” constitutional settlement as well as the channel for arriving at that settlement, would become a liability. On the one hand, as the *agent* of integration, the law threatened to become a medium whose prudent husbanding of the integration *acquis* would instead translate as excessive political rigidity. The danger was that the legal proofing of agreements against easy political reappraisal and the prevention of new initiatives except through still highly consensual and only moderately democratically-inclusive procedures, or through the terse increments of the Court of Justice, would become more a way of avoiding the legitimate expression of political choice and contestation and less a means of protection against free-riding or against ideologically inspired skepticism towards positive-sum collective commitments. On the other hand, where the pressure towards positive integration *has* led to legal change, and as more and more controversial value choices have begun to be reflected onto the legal domain—this has also affected the ideological potency of law as the *object* of integration. As legislation begins to articulate more clearly the controversial political value choices between market liberalism and social protection some of the detached,

efficiency-maximizing veneer is stripped from legal supranationalism (Weiler 1999: ch. 2, Hix 1998: ch. 3)

The gradual fraying of the “permissive consensus” (Hooghe and Marx, 1998) around the idea of legal supranationalism set the deep context within which the big “C” (Walker 2005) constitutional debate emerged. Other factors contributed, notably the wave of eastward Enlargement after the fall of the Berlin Wall. The increase in the size of the EU from fifteen members in 1997 to twenty-seven in 2007 raised acute questions about the adequacy of an institutional structure initially built for a homogenous western European club of six states to a sprawling pan-European expanse of 500 million persons. Indeed, Enlargement and its supposedly unmet and externally-sourced institutional needs provided an important rhetorical framework for the EU’s decade of reform. It was the thread that connected the busy sequence of Treaty reforms from Maastricht to Nice in 2000, whose unfinished business in turn led to the historic decision at the Laeken summit in December 2001 to establish a Convention on the Future of Europe (Walker 2003a, Hirschl 2005). Yet the focus on Enlargement merely channeled, accelerated and provided a kind of discursive common ground for a process of reflection and contestation over the kind of polity the EU was and could become that was *in any event unavoidable* in light of the increasing inadequacy of the received model.

The explicit Big “C” Constitutional moment, therefore, can be seen as a result of the increasing visibility of the hard choices facing Europe. Crucial both to its initial profile and success and to its eventual failure, the Convention process, unlike previous non-explicit documentary constitutional initiatives, succeeded in attracting the political energy and sponsorship of a number of different polity visions engaging with these hard choices. It was no longer, in other words, just a federalist vehicle, and was not seen as just a federalist vehicle.

For sure, one of the three key polity visions was a neo-federalist one, though less crude than some of its predecessors.⁵ And if it was undoubtedly the candidate vision that remained most heavily invested in the big “C” solution, it was far from the most commonly endorsed approach feeding the Convention momentum. It sought for the new EU constitution, through a combination of inclusive Convention process, integrative content and culturally unifying symbolic product, to deliver some kind of functional equivalent to the peaks of popular self-authorization, comprehensive design and deep political identity

⁵ Jurgen Habermas is a key point of reference here. As an internationally prominent public intellectual of the democratic Left, he was in the vanguard of a movement, largely outside the Convention process, which sought to reconstruct the terms and meaning of the Convention in a more explicitly federalist manner (see e.g. Habermas 2001, Habermas 2006, Habermas 2008)

associated, at least ideally, with the constitution of the modern state. In this way, the “asymmetry” (Scharpf 1999) of a settlement in which the EU lacked the pooled political resources to deliver legitimate and effective collective solutions to politically and intergovernmentally contentious issues of economic and social policy that increasingly fell outside the independent capability of national governments, might be overcome. Importantly, for the most part the neo-federalist approach did not envisage the EU *as* a federal state, (Mancini 1998) so acknowledging the concerns of the state-centered constitutionalists. It did not, in other words, seek to replace the states as the single point of original collective agency, final authority and deep political identity within the European domain. Rather, this more mature version of neo-federalism sought to develop or recognize these state-familiar constitutional assets of political community on an independent footing for the EU, and in a manner that envisaged neither superiority nor subordination to the states but engagement in a non-hierarchical relationship with them. So the EU would have a foundation and reference point of collective agency (i.e. the European “people” and the European states) that was distinctive and self-standing without being the only such distinctive and self-standing point of reference for the various constituencies (i.e., European “peoples”) which made up the new collective agency (Walker 2007). It would have a sphere of authority that was final without being exclusive or exhaustive. Finally, and building on the formal supranational citizenship provisions in place since Maastricht,⁶ it would also possess a form of framing or organizing political identity, complete with rights, obligations and membership status, which was again distinctive but not unique in this function. Instead, it would operate in tandem with the other (predominantly state-centered) organizing political identities of its subjects (Weiler 1999: ch. 10).

Alongside this vision, however, were two others. A sharply opposing perspective was one of constitutional retrenchment. It was concerned to draw a line in the sand by resort to mechanisms such as a competence catalogue, the entrenchment of the Charter of Rights and the empowerment of national Parliaments. Here, constitutionalism was invoked, both materially and symbolically, not as a generative measure but as a limiting device to ensure against the further evacuation of state power to the supranational level.⁷

⁶ See now; Treaty on the Functioning of the European Union, Arts. 20-25.

⁷ This explains, for example, the conversion of the famously Eurosceptic *Economist* magazine to the cause of a European Constitution (*The Economist*, December 15th 2001). Tellingly, each of these constraining measures was itemized in the original post-Nice “leftovers” agenda, which triggered the Laeken summit and the Convention on the Future of Europe (see Walker 2005).

Finally, there was a more pragmatic and explicitly *sui generis* approach, concerned with pursuing or consolidating Europe's special way - its "*Sonderweg*" (Weiler 2001). Its defining priority was neither the revival of a neo-federal vision nor the protection of state prerogatives. Rather, it was ensuring against the kind of political blockage and institutional stasis which would prevent Europe from making the governance adjustments necessary for its distinctive "post-national" accommodations between market and state, supranational and intergovernmental, legal fixity and political openness, to be maintained and updated. In its practical attention to the demands of a novel problem-solving context and in its non-alignment with "old" state-sovereigntist coded oppositions, this view was in fact the quiet motor of much of the pro-Convention movement. Constitutionalism here assumed importance less for its special content or projection—and more as way of regaining political attention, of re-energizing and re-validating a macro-political reform process which, given the cumulative disappointments and deferrals of the Amsterdam and Nice Treaties, was falling foul of the law of diminishing returns (Weiler 2005, De Witte 2003). It is in this vision, indeed, that European constitutionalism appears more analogous to second or successor phase constitutional initiative at the state level, concerned not with a rupture of opening (federalist) or closure (retrenchment), but with harnessing and consolidating the political energy and legal resources necessary for continuing and evolutionary adaptation.

Given the disparity of polity visions brought to the table, it is no surprise that the big "C" constitutional initiative failed. Here we see the unresolved quality of the EU Constitution in bold and sustained relief. The very conditions of indeterminacy that encouraged the initiative also produced the open horizon of alternatives and the intensity of disputation which invited its ultimate failure. What is more, the requirement of the unanimous ratification of the then twenty-five member states to succeed meant that the process was indiscriminately vulnerable to negative assessment—to defeat on the basis of rejection of *any* of its various affirmative visions rather than endorsement of a concrete alternative. And, of course, the vision most vulnerable to defeat in state-framed constituencies was the proto-federal vision, as we saw in the defensive nationalism and Euroscepticism expressed in the key French and Dutch referenda defeats in the Spring of 2005.

In the summer of 2007 the European Council bowed to what had seemed inevitable since these two negative votes and announced its decision to "abandon" the "constitutional concept" it had endorsed so optimistically only four years previously on receiving a draft of a first Constitutional Treaty for the European Union (EU) from the Convention on the Future

of Europe.⁸ It opted instead to return to the more familiar international law vehicle of a “Reform Treaty.”⁹ The move appeared to pay a political dividend. Agreement was reached as early as the Lisbon summit of December 2007 and, despite further delay occasioned by a fresh referendum defeat in Ireland, the new “post constitutional Treaty” (Somek 2007) was successfully implemented before the end of 2009 (Craig 2010). Significantly, the new measure retained most of the substantive reforms of the Constitutional Treaty, but was meticulous in its removal of the latter’s high constitutional language and symbolism. It discarded not just the “constitutional” label and the ideal of a single foundational document, but also references to the European flag and motto, and even to European “laws” and “framework laws.” Material reform of the institution system and the jurisdiction range of the EU eventually proved possible, therefore, absent the distracting and divisive baggage of the different polity visions which intense exposure to the traditional language and forms of explicit constitutionalism had encouraged.

It is a telling irony of the ultimately fatal difficulties encountered by the Convention project, however, that its trials coincided with the growing acceptance of some kind of constitutional status for the EU—even if understood in “small ‘c’” rather than documentary “Big ‘C’” terms. Documentary constitutionalism may have suffered its most comprehensive and significant defeat, if only because it had for the first time been rendered explicit and had reached the center of the political agenda. Yet the very explicitness and heightened profile of the constitutional discourse across such wide range of polity visions had left its mark. In the years immediately following the failed Big “C” initiative, the old incrementalist story of legal constitutionalism, and indeed the wider cumulative institutional settlement of the mature EU was itself now increasingly viewed in expressly constitutional terms, even, and perhaps especially, by those who had opposed or lacked enthusiasm for the Convention initiative. Not just politicians and commentators, but both the Court of Justice and national constitutional courts,¹⁰ began to refer more often and more explicitly than ever to the EU’s own distinctive non-documentary constitution (Besselink 2009, Walker 2012). Having rejected a formal constitution, then, the elites of the EU now appeared to have resolved not only that it was excessive in its ambition but also that it was redundant in principle; that the EU, rather like

⁸ German Presidency Conclusions: European Council, Brussels, 21-22 June 2007.

⁹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 01.

¹⁰ See, for example, the explicit references to the supranational constitutional tradition in the German Constitutional Court’s ruling on the (domestic) constitutionality of the Treaty of Lisbon;(2010) 3 CMLR 276 (see also Halberstam and Mollers 2009).

the *bourgeois gentilhomme* in Moliere's play, had been speaking informal "constitutional prose" all along. "Constitution," therefore, was recoded as an achievement concept rather than an aspiration concept—as a way of pointing to and reaffirming a form of political life, however thin and fragile, held in common, rather than as a conduit for various distinct and unreconciled visions of the polity. Constitution, in other words, no longer signified what remains unresolved in the EU polity but what was already resolved. The narrative of Europe's constitutional foundations moved from the future tense, where it had been conspicuously unsuccessful, to the safer terrain of the past tense.

CONCLUSION: A SHIFTING INHERITANCE

Is the story of the emergence of the European Union constitution over? Is the shift in tone of the new phase of explicit constitutionalism from high to low, from formal to informal and from conflicted to resolved, a decisive one? Will the dominant narrative of constitutional origins remain past-oriented? Will its settled emphasis be upon the stepwise development and gradual consolidation of a semi-autonomous institutional system and a secondary culture of political belonging - a story in which no single documentary initiative is decisive and where much rests on the pioneering early work of the Court of Justice in securing an autonomous legal order? Or might the narrative of origins shift again?

We cannot be sure. The sovereign debt crisis has, since late 2009, returned many of the concerns which provoked the Big "C" debate of the last decade center stage. It has placed unprecedented pressure on the capacity of the EU to balance the imperatives of general economic integration, in particular the need to stabilize the common Euro currency, against the social damage caused to those member states, most prominently Greece but increasingly also other predominantly Southern member states, with high levels of public debt or of publicly guaranteed private debt. Tied to a single continental monetary policy and both practically and legally unable to pursue growth-based fiscal policies, heavily indebted states find themselves in a bind which generates every higher levels of political tension between them and the economically stronger parts of the Union. On the one hand, the indebted states have required and sought increasing levels of financial aid through central institutions such as the European Central Bank and the European Financial Stability Facility. Such support inevitably involves politically difficult levels of redistribution from richer member states. On the other hand, the governments and populations of the indebted states resent the contribution of the lending policies of the banks of rich member states to their spiral of indebtedness and

complain that they are allowed neither the legal nor the financial means to stimulate their domestic economies sufficiently to develop a viable medium terms strategy for overcoming debt.

In such circumstances neo-federalist thinking inevitably reasserts itself. The Treaty on Stability, Co-ordination and Governance (TSCG) of March 2012, signed by all member states other than the UK and the Czech Republic, is one harbinger of this (Craig 2012). It approves the imposition, monitoring and sanctioning from the European center of an unprecedentedly intrusive set of fiscal disciplines as the price of access to a more generous rescue funding under a new European Stability Mechanism. In turn, such a combination of financial solidarity and top-down regulation and enforcement inevitably fuels the case for greater democratic representation at the newly empowered center. At the same time, it stimulates a counter-reaction. Some would prefer the reduction of the Eurozone to a strong core as part of a new multi-speed Europe (Piris 2011), while others view the loss of national sovereignty dramatized by the Euro crisis as fundamentally unacceptable and so advocate the retreat or even the break-up of supranational Europe.

The debate is polarized, the future of the European Union perhaps more uncertain than ever. In such circumstances, radically discontinuous change is more likely than incremental reform. Certainly on the neo-federalist side, such change may be contemplated as taking the form of a new constitutional foundation, of which the TSCG may be an early signal. For those who see the Euro crisis as an occasion for national retrenchment, too, the prudential case for constitutional guarantees at the center—previously made at the time of the Constitutional Treaty—may come to seem attractive again.

In either case, the focal point of the constitutional foundations may shift again. It may be projected back to the future, with the incrementalist narrative, centered on judge-led legal bootstrapping and serial Treaty reform, downgraded to the pre-constitutional overture to the main event. Alternatively, foundational constitutionalism may stay off the agenda. The political challenge of the crisis may be won without the EU being compelled to revisit the kind of explicit constitutional approach whose last failure is such a fresh memory. Conversely, the crisis may be lost without the EU being *able* to successfully revive explicit documentary constitutionalism. Whether or not we have reached the end of the EU's constitutional beginnings, therefore, remains a moot point, and one tied up with the very conditions of survival of the world's first supranational polity.

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